UNITED COMMERCIAL BANK LTD. v. NEW ERA CORPORATION

[O.C.J. (Kulasekaram J.) July 9, 1976]
[Singapore — Suit No. 2433 of 1972]

Bills of Exchange — Claim against acceptors — Claim by plaintiff bank as holders — Bills of exchange bought by bank — Defence that bills drawn on goods shipped on consignment basis — Defendants denying that plaintiffs were bona fide holders for value.

The plaintiffs claimed against the defendants for the sum of $47,488.27 as acceptors of 2 bills of exchange drawn at Bombay by International Impex Bureau upon the defendants payable after 90 days of acceptance to the plaintiffs who were holders/payee. The defendants denied liability and alleged that the bills were drawn for goods shipped to them on consignment basis to the knowledge of the plaintiffs. They also denied that the plaintiffs were bona fide holders for value of the two bills.

Held: (1) that on the evidence, the plaintiffs' version was to be preferred to that of the defendants'. The bills of exchange were accepted by the defendants unconditionally and they were liable on them;

(2) the provisions of section 30(2) of the Bills of Exchange Act did not apply to the plaintiffs as they were the original payee holders of the bills and in any event in this case the plaintiffs had shown that they had given value in good faith for the bills.

Case referred to:-

(1) *Talbot* v. *Von Borris* [1911] 1 K.B. 854.

CIVIL SUIT.

P. Selvam for the plaintiffs.

J. B. Jeyaretnam for the defendants.

Kulasekaram J.: In this action the plaintiffs' claim against the defendants was for a sum of $47,488.27 as acceptors of 2 Bills of Exchange drawn at Bombay by Messrs. International Impex Bureau upon the defendants payable after 90 days of acceptance to the order of the plaintiffs who are holders/payee and for interest on this sum. The defendants denied any liability on the claim. They alleged that the plaintiffs on behalf of the drawers presented these 2 bills along with 5 other bills drawn on them by Messrs. International Impex Bureau (hereinafter called the drawers). These bills were drawn for goods shipped by the drawers to the defendants. They further alleged that these goods were shipped to them on consignment basis to the knowledge of the plaintiffs and in accordance with the previous course of business dealings between the drawers and them. In addition it was alleged that the defendants' sole proprietor had in fact informed the plaintiff Bank's Manager in Singapore prior to the acceptance of the bills that the goods were sent on consignment basis for the account and risk of the drawers and that they (the defendants) would only accept the bills if the plaintiffs themselves would not claim payment in their own rights. They said plaintiffs' manager had accepted this condition and thereupon the defendants had accepted the bills. The defendants also alleged that previous to the acceptances of the said 2 bills they had accepted through the plaintiffs other Bills of Exchange drawn upon them by the drawers subject to the same conditions. The defendants denied that the plaintiffs were *bona fide* holders for value of the said 2 bills.

The plaintiffs' first witness, Mr. Narayanan, was the Manager of the main Singapore branch at Raffles Place of the plaintiff bank at the material times relating to the transactions of these 2 bills the subject matter of this action. According to him he joined the plaintiff bank in 1946 and was transferred to Singapore in 1957. From then onwards he had been either with the main Raffles Place Branch or its other branch at Serangoon Road till February 5, 1972 when he was transferred out of Singapore to one of the bank's other offices in India. He is now a Divisional Manager of the plaintiff bank at Bangalore. Whilst in Singapore and even elsewhere prior to that he had worked in the Inward Bills Departments of the bank's offices and he was fully conversant with the nature of work there. From 1968 till his departure in February 1972 he had been the Manager of the Raffles Place branch of the plaintiff bank and as such he was not concerned with the bills that come to the bank as that would be looked after by other senior officers of the Inward Bills Department. He attended mainly to the administration and the overall supervision of the bank in Singapore.

He first became aware of the defendants' problems with the bank when his attention was drawn to the two unpaid bills by a personal letter which he had received from the Bombay Branch Manager around early May 1964. That letter is AB54 where the Bombay Branch Manager asked him to use his good offices and contact the drawee of these 2 bills and have him settle them soon. He then called Mr. Khemani, the sole proprietor of the defendant firm, to the bank for a discussion. This discussion must have taken place sometime in May 1971. He does not remember exactly what happened on that occasion but could recollect that Mr. Khemani made out to him at that discussion that the goods relating to the Bills of Exchange were sent to him on consignment basis by the drawers at the sole risk and responsibility of such drawers and as he was not able to dispose of the goods he was not in a position to pay the bills. He then pointed out to Mr. Khemani that as he had accepted the Bills of Exchange he would be liable on them. Mr. Khemani replied that he had certain arrangements with the drawers and unless these terms were fulfilled he would find it difficult to honour his obligations.

Mr. Narayanan explained that the 2 bills in question about which he had spoken to Mr. Khemani were the 2 bills FBPRW 65 and 66 (FIBC 485 and 486) which had been purchased by the Bombay branch. At the time of discussion with Mr. Khemani he was aware that there were many other collection bills from Bombay outstanding on him but his discussions were purely on these 2 purchased bills, the subject matter of this claim. Mr. Narayanan produced the originals of these 2 bills and they are the exhibits P2A and P2B.

Mr. Narayanan went on to explain that the Bombay Branch of the Bank used the code prefix letters "FBPRW" against the serial number assigned to the bill to signify bills purchased by that bank. The letters "FBPRW" stood for "*F*oreign *B*ills *P*urchased in *R*upees without Letter of Credit". For other foreign bills where they were merely collecting for customers the bank used the code prefix letters "FBC" against the serial number of the bill. The letters "FBC" stood for "*F*oreign *B*ills for *C*ollection". The Bombay

Branch used a round rubber stamp chop for bills purchased with the letters FBPRW with the serial number of the bill inserted within as could be seen in P2A and P2B and for collection bills they used a triangular shaped rubber stamp with the letters FBC with the serial number written within as could be seen in AB59 and 60. The Singapore Branch did not make any distinction in Inward Bills be they collection bills or bills purchased. They used a square rubber stamp chop with the code prefix letters "FIBC" with the serial number where the letters "FIBC" stand for "Foreign Inward Bills for Collection".

Mr. Narayanan explained that from the code prefix letters "FBPRW" on the 2 bills in question he was able to say that these 2 bills had been purchased by the Bombay Branch. In P2A the expression "At 90 days D/A" meant that 90 days after acceptance the drawee will be called upon to pay the bill. The words "D/A" stood for "documents against acceptance" and meant that the documents of title of the goods covered by the bill would be released to the drawee on his acceptance of the bill. The documents in such cases would be Bills of Lading, the invoices and the insurance policies. These 2 bills were accepted by the defendants on March 11, 1970 and were due for payment on June 9, 1970. On the due date the Bank's Bill Collector would go with the bills and with statements like AB21 and 22 to the defendants. From AB21 and 22 Mr. Narayanan said it appeared that interest here had been finally calculated up to May 15, 1972 which he said was probably the date when the last attempt was made by the bank to get paid on these 2 bills. Since the discussion in May 1971 he remembers Mr. Khemani coming and seeing him several times when arrangements were already afoot for the bank to take legal action against the defendants on these 2 bills. Mr. Khemani then appeared to be very nervous and upset and was very keen to find a solution to these 2 bills. Mr. Narayanan said the allegation in the defence that Mr. Khemani had informed him prior to accepting the bills that the goods were sent on consignment basis for the account and risk of the drawer and that he would only accept the bills if the bank themselves would not claim payment in their own rights was a blatant lie. The further suggestion that when Mr. Khemani allegedly saw Mr. Narayanan in February 1971 or early March 1971 Mr. Naravanan after looking through the earlier bills and confirming that they were collection bills in which the bank had no interest had accepted that condition and it was only then that Mr. Khemani had accepted the bills was also not correct. It was also not correct that previous to the acceptance of the said bills Mr. Khemani had accepted through the plaintiff bank other Bills of Exchange drawn upon the defendants by the drawers on the same condition. Mr. Narayanan went on to say as far as any bills from Bombay were concerned he had never seen Mr. Khemani regarding the collection or acceptance of any bills before the discussion in May 1971. He had however seen Mr. Khemani before as a customer of the bank and had also known him socially. The first time he saw Mr. Khemani about any such bills was when the Manager of the Bombay Branch drew his personal attention to the 2 unpaid bills in question by his letter AB54 in May 1971.

He said he knew Mr. Khemani socially but had never had any social engagements with him except once when a Swami (a religious leader) came to his house. He had met Mr. Khemani at social functions but had not accepted any great hospitality from him. Mr. Khemani had come to the bank several times and on some of these visits he may have called on him at his office. He knew him as a customer of the bank and Mr. Khemani had certain credit facilities with the bank and as far as those transactions were concerned he found that he had honoured his commitments properly. He knew that the 2 bills in question were protested when the bank contemplated taking legal proceedings against Mr. Khemani. He did not see the protest notes however. It would have been dealt with by the Inward Bills Department of the Bank. He himself knew for the first time that the goods were sent on consignment basis from Mr. Khemani at that first meeting in May 1971. It was during November, December 1971 and January 1972 that Mr. Khemani saw him several times about the 2 bills. At these meetings Mr. Khemani had put forward the suggestion that he would re-ship the goods to India and then go personally to Bombay and use his influence with his friends in the same line of business for the sale of the goods there at the best price and pay the bank. Mr. Narayanan's answer to that suggestion was that it would involve exchange control problems and moreover the bank was the holder for value of the accepted Bills of Exchange. At these discussions Mr. Khemani did not agree to settle the bills but was keen to arrive at a settlement regarding the bills. Mr. Narayanan said that he had not drawn Mr. Khemani's attention to the distinction between collection bills and bills purchased by the bank and the different rubber stamp chops that were used by the bank to distinguish the 2 types of bills. He did not consider it necessary to have done so. He said that the drawers could have informed Mr. Khemani as to the bills which had been purchased by the bank. He did not know if the drawers had so informed the drawee but Mr. Khemani between October 1971 and January 1972 was very much concerned to bring about an immediate solution in respect of these 2 bills only, though he had a number of other bills also outstanding then which were however Collection Bills. The witness was also questioned at length on the question of interests payable on the Purchased Bills and connected matters but I do not think anything material turns on them. This witness was referred to 3 memos or statements relating to 3 bills and these memos have been marked D5A, D5B and D5C. He admitted that the 3 bills relating to D5A, D5B and D5C were originally Purchased Bills but were later altered to Collection Bills by Bombay. When questioned why this had been done he replied he did not know the reason. These were originally "sight" bills. The drawee may well have refused to pay on presentment and they would have referred to Bombay the reason for such refusal and it was quite likely that Bombay would have recovered the money from the drawers and then had asked the Singapore Branch to treat the bills as collection items. When questioned if the bank had taken any action to recover the moneys due to the bank on the 2 bills after the due date June 9, 1970 he replied that the bills had been protested for non-payment and the bank according to his information had also

called upon the defendants either personally or over the phone to settle these bills. He said on moneys due on such bills the bank in Singapore would not debit the drawee's current account without express permission in writing from the drawee. When it was put to him that Mr. Khemani's seeing him several times during the period mentioned was only for purposes of getting the goods back to the drawers and to find out if the bank would do that, he replied that it was not so. Mr. Khemani's meetings with him were confined to the question of the bank proceeding against him legally. When it was put that after the protest Mr. Khemani had telephoned him and asked him why he had protested on the bills and to which he had then replied that it was a formality and he needed the evidence for the Reserve Bank of India and Mr. Khemani should not worry about the protest, Mr. Narayanan replied that he could not have said that and that it was a mischievous and deliberate lie.

The other main witness for the plaintiff bank was Mr. Felix Pereira, an Assistant Accountant of the Bank and he was in charge of the Inward Bills Department of the Bank from 1965 to 1972. He had two assistant officers under him one of whom dealt with foreign bills received for collection and the other with foreign bills negotiated under Letters of Credit. The bills for collection were not all of the same kind in that some of the bills may have been purchased by their foreign branches while others would be merely Collection Bills from them. His department in Singapore made no distinction between these two types of bills and would serially number the bills and use the prefix "FIBC" against the serial number to indicate that they were Foreign Inward Bills for Collection. He went on to say that he would however be able to distinguish inward bills received from their branches as to whether they were bills purchased by the branches or bills where the branches were merely collecting for their clients. He had merely to look at the code letters prefixing the serial number assigned to the bills by the branches. In the case of bills purchased by the bank the code letter prefix would be "FBPRW" and in the case of collection bills "FBC" as already indicated by Mr. Narayanan. In the case of the two bills in question, that is, the bills AB49 and AB57 which are the photostat copies of the bills P2A and P2B the code letter prefix here in the case of both the bills were "FBPRW" From that he was able to say that the Bombay Branch had discounted the 2 bills and credited the account of the drawers there with the amount of the 2 bills they had purchased. These 2 bills were "90-days D/A Bills" and were accepted on March 13, 1970 and were due for payment on June 19, 1970. He went on to explain that in the case of D/A Bills such as these the Bill Collector would take the bill and the documents relating to the bill and present the bill to the drawee, in this case the defendants (Mr. Khemani, the sole proprietor), for acceptance and once accepted the documents would be released to the acceptor. The Bill Collector would bring the bill back and hand it to his assistant officer in the bank who will then take the necessary action on it. The defendants in this case did not make payments on the 2 bills on the due date and the Bombay Branch had been advised of such non-payment on presentment by the usual notice AB28 dated June 18, 1970. Subsequently on cable advice from the Bombay Branch dated April 10, 1971 he instructed solicitors to protest the 2 bills for non-payment. On November 2, 1971 by letter AB81 the defendants offered the goods comprised in these 2 bills to the bank for re-shipment back to India on the bank's surrendering to the defendants the bills in question in final settlement. Mr. Pereira said that he had taken no action on this letter as by then Mr. Narayanan was having discussions with Mr. Khemani following the request from the Bombay office in AB54 of April 26, 1971 that Mr. Narayanan should use his good offices to secure payment on these bills from the defendants.

Mr. Pereira had explained that when bills were received with the related documents they would record all the particulars in a set of manifold forms like exhibit P1. The particulars for this form were extracted from the covering schedules like AB15 and 16 and other documents accompanying the bills. This set of manifold forms was prepared before the bill was sent out for acceptance.

In cross examination Mr. Pereira explained in great detail the various steps taken in connection with the presentment of a bill for acceptance and what further steps were taken thereafter to secure payments on the bills on the due dates or subsequent extended dates and how the interested parties were kept informed as far as necessary of the various steps that were being taken and of the results of each step. Mr. Pereira explained which copies from the set of manifold forms were sent to whom and at what stage in the course of such transactions. For instance when the bill was accepted the Bill Collector would return the bill to his assistant officer who would then work out the due date of payment and would inform the sending bank of the acceptance and the due date for payment by filling in the details in "Remitters File and Diary" copy from the set of forms P1 and despatching it to the bank in question. Likewise the acceptor would be informed of the due date of payment by filling in the "Advice of Due Date" copy of P1 and sending it to the acceptor.

When questioned as to whether he had come across any confirmed contracts among the documents accompanying the bills he replied in the negative and said generally such documents would not accompany the bills. He further agreed that in the Invoices AB8 and 9 relating to the 2 bills here there was no reference to any order. In his experience in some invoices there were references to orders while in others there were no such references.

The witness was referred to Exhibit 'E' of enclosure 10 of this suit. Exhibit 'E' is a list of all the outstanding bills where payments were still due on the bills drawn by the drawers on the defendant firm or the sister firm Ashoka Traders. All the 16 bills on this list were now D/A Bills which had been accepted by the drawee. The first 5 bills on this list were accepted at various dates in 1969 and the remaining 11 bills were all accepted in March 1970. Except for the 2 bills. the subject matter of this action, all the other 14 bills were Collection Bills then. He was cross examined about the progress and the

steps taken after acceptance to secure payments in the case of each of these bills. Practically all the bills had been presented for payment on their respective due dates but no payments were received and extension of the due dates were asked for by the defendants generally. In every such case advice of non-payment with the request for extension of time was communicated to the bank at Bombay. Subsequent presentments of the bills for payment on the new dates had been made and advices of non-payment with either a request for extension of time or with a reason for non-payment such as that the defendants had not responded (when no specific reason was given) were sent to the Bombay Branch.

Most of the bills were protested for non-payment in April 1971.

In the case of Bill FIBC 211 it was accepted on August 29, 1969 and the due date was October 28, 1969. He was however not able to trace any record of any presentment of the bill for payment or any advice of non-payment though he felt some action would have taken place.

In the course of further cross examination he was referred to the defendants' letter AB81 of November 2, 1971 where the defendants claimed that goods comprised in the bills stated there were on consignment and questioned if that was the first time he knew the goods were sent on consignment basis. He replied in the affirmative and next added:

"Now I realise there was a note made on one of the Bills. Above the acceptance 'on consignment'. I now produce this Bill — marked P9 — Bill dated July 21, 1969 and accepted on August 29, 1969."

The Bill Collector acording to him after the acceptance would have handed the bill to the assistant officer dealing with bills who at that time was Mr. Ng Gim Cheong. He is now no longer working with the bank. If Mr. Ng had seen this he should have brought it to his attention. He was quite positive that this form of acceptance of this bill was not shown to him. Incidentally it should be observed that Exhibit P9 the bill in question here was the Bill FIBC 211.

In further cross examination it was put to him that as the bank had express notice that the goods were on consignment it was their duty to inform the Bombay Branch about it. He replied that if they had noticed those words "on consignment" in Exhibit P9 they should have informed the Bombay Branch of the Bank about it.

Mr. Pereira explained that the bill was originally a 'sight' bill purchased by the Bombay Branch but when it was presented to drawee he wanted it altered to a 60 days D/A Bill. The defendants did not then say that these goods were on consignment.

The original bill had been replaced by the present 60 days D/A Bill which is Exhibit P9. The Bombay Branch had also now changed this bill to a Collection Bill. It was accepted on August 29, 1969 and the due date of payment was October 28, 1969.

Finally after this wtiness had been re-examined counsel for the defence Mr. Jeyaretnam with leave of court further cross-examined him on some fresh documents which had just been handed to him by counsel for the plaintiffs, Mr. Selvam, as follows:—

"*Q.* Did you receive a letter from your Bombay Branch office dated June 7, 1971 that the drawer wants the goods relating to Bill FIBC 211 re-shipped to India?

A. Yes — letter marked P11.

Q. Did you take any action on this letter?

A. By the time we received this letter we had already released the goods against acceptance under the B. of E. After acceptance by mistake the B. of E. and the related papers were filed in the 'inactive' file and as a result no due date advice was sent to Bombay. As a result of the non-advice Bombay assumed the goods were lying uncleared. When I received P11 I checked up the 'inactive file' and traced the relevant documents. I explained the position to Mr. Narayanan and Mr. Narayanan wrote a letter to Bombay and explained the position."

Once again I draw attention that the bill that went by mistake into the 'inactive' file was the very same Bill FIBC 211 and had lain there till it was traced by Mr. Pereira after receipt of the letter P11 dated June 7, 1971.

The main witness for the defence was Mr. Khemani the sole proprietor of the defendant firm. He carries on business as importers, exporters and commission agents in the name of the defendant firm and another firm called Ashoka Traders where he is in partnership with his wife.

According to him whenever they import or export goods there would be a firm written contract containing all the agreed terms between the parties.

In October 1967 he came to know of International Impex Bureau in Bombay when Mr. Vishandas, the senior partner of this firm visited him in Singapore in his office. He had previously heard of this gentleman as being in business in Bombay. On this occasion he wished to do business with him and as a result of the discussion they concluded an agreement as at AB1. He explained that Mr. Vishandas was prepared to send goods on consignment even without a firm order because he wanted to get the benefits of the "Export-Import Incentive" Scheme which was then in operation in India. By that scheme if an exporter in India could show that he had exported goods he would be granted an import licence to the extent of 70% of the value of goods he had exported. To get the maximum benefit under this scheme the invoiced value of the goods exported is generally an inflated value and not their true value. Moreover the Reserve Bank of India would not approve import licences on account of goods exported on consignment basis. This is the reason for the agreement AB1 in that form.

Though the goods were to be sent on consignment basis under the agreement the goods were to come on "D/A" Bill basis as though it was an outright sale. When the goods were shipped from Bombay Mr. Vishandas would draw a Bill of Exchange through the bank on the defendant firm or its sister firm. In India exporting must be done through a bank. The drawers would post the duplicate shipping and other connected documents to him while the original documents and the Bill of Exchange would come through a bank. The Singapore Bank would present the original documents with the Bill of Exchange to him and on his accepting the Bill of Exchange would re-

lease the original documents of title to the goods. He would then take delivery of the goods and try and sell them. Whatever amount was realised by the sale was credited to the drawers and the balance of the amount if any due for meeting the bill on the due date of payment would be remitted by the drawers. Whatever goods were not sold would be on the account and risk of the drawers. This was how the arrangement under the agreement, AB1, was to work.

The letter AB2 refers apparently to the first shipment under this arrangement. The first 4 or 5 bills under this arrangement had been duly retired and the money to make those payments came partly from the proceeds of the sale of the goods and partly from money sent by the drawers. None of his own money had been used to meet these bills. The subsequent bills were still outstanding and are as in the list Exhibit 'E'. The 2 bills the subject matter of this action are also included in this list.

Whenever any of the bills were presented for acceptance by the Bank's Bill Collector he would know beforehand that they would be coming as the drawer would have informed him by letter or sent the duplicate documents to him. So when the bills were presented for acceptance his impression and understanding was that the drawers were presenting these bills and the bank was purely acting as their collecting agent. He did not think the bank had any interest in these bills.

Besides his experience was that if the bank had an interest in the bill then besides getting his acceptance on the bill the bank would also get him to sign a trust receipt. As an instance of this procedure he produced the documents D9 relating to an import transaction from Japan with a Bill of Exchange where in addition to his acceptance of the bill he was required by the bank to sign a trust receipt before the release of the documents. When the Bank's Bill Collector presents the bill for acceptance the Bill Collector does not speak to him but merely presents the bill and once he accepts the bill the Bill Collector releases the documents of title of the goods and he in turn returns to the Bill Collector the bill with his signature on it.

He was not familiar with the code references used by the Bombay Branch of the Bank but only with the code reference of "FIBC" used by the Singapore Bank. When he saw the "FIBC" stamp of the Singapore Bank he took it the bank was acting here merely as a collecting agent. He was not aware that when there was a claim for interest in a "statement of acceptance" form like AB22 then that bill was a bill which had been purchased by the bank. He himself had not paid any interest on those bills. He had also not been informed by the drawers that any of the bills had been sold to the bank.

He knew Mr. Narayanan from 1966 when he was the Manager of the Serangoon Road Branch of the Bank. Then when Mr. Narayanan was transferred to the Head Office of the Bank in Singapore at Raffles Place he opened a current account in the name of Ashoka Traders with the Head Office and it was Mr. Narayanan who personally introduced him to the bank for this purpose. From then on they were on very friendly terms and if he happened to be around that area he would normally call on him. He made about 2 to 4 such calls in a month. If he had any dealings with the bank too he would normally see Mr. Narayanan.

He agreed he had written in Exhibit P9, the bill FIBC 211, the words "on consignment" over the acceptance there. He said he did this to test the reaction of the drawers. He was also concerned about his reputation with the bank because the bank might misjudge him as he had not been making payments on the previous bills. When he next saw Mr. Narayanan, and that would be within a month of his making this endorsement, there was a discussion on this matter. Mr. Narayanan told him in future he had better not write the words "on consignment" on the draft or bill. Mr. Narayanan had also added as this was an illegal transaction the drawers and some bank officers in India might get into trouble. He himself had on this occasion specifically mentioned to Mr. Narayanan about the arrangement he had with the drawers though he might also have done so earlier. Mr. Narayanan then confirmed that the banks, meaning the Indian Banks, were aware of this kind of consignment dealings and the importers like him generally would not be pressed for payments on such dealings. This discussion had taken place at Mr. Narayanan's office in Raffles Place.

Around mid-February 1970 he received letters from the drawers informing him that he would be receiving a number of shipments of goods and bills in March. He then went and saw Mr. Narayanan after receiving this information and before his acceptance of these March bills. As some of the earlier bills had not been withdrawn or retired by the drawers he wanted to clear his position with the bank that these goods were coming on consignment basis of which Mr. Narayanan was already aware. Mr. Narayanan had then told him that the bank's role was purely that of a collecting agent on behalf of the drawers and that the bank would not on their own rights claim on these D/A Bills from him.

On March 11 when the 2 bills in question here were presented they were presented together with two other bills. He did not notice any distinction among any of the 4 bills or even the earlier bills. The Bill Collector too did not say anything about any of the bills. He signed all the 4 bills and gave them to the Bill Collector and received from him all the documents. He did not hear anything more about these two bills nor did he make payment on them. On April 13, 1971 a clerk from M/s. Murugason & Co. brought one of the two bills in question and asked him for the reason for non-payment. He replied that the goods were on consignment basis and were still lying in P.S.A. godown. Immediately after this clerk had left him, he telephoned Mr. Narayanan and asked him why a protest note was being made and Mr. Narayanan replied it was a Reserve Bank of India's formality in case of outstanding bills as they desired to know the reason and he should not worry about the protest note. He was positive that between acceptance of the 2 bills and the protest on April 13, 1971 the bank in Singapore at no time telephoned, wrote or orally asked him for payments on the 2

bills in question. Again on April 30, 1971 five more bills including the other one bill of the disputed 2 were also protested for non-payment. On Mr. Narayanan's assurance he did not take the matter up any further with the plaintiff bank but he was trying with the drawers to send back the goods to India. Even after the protest the bank did not ask him to pay the 2 bills. The first time he received a demand was in July 1972 when the solicitors for the bank demanded payment on these 2 bills. He saw Mr. Narayanan two or three times towards the end of 1971 to return the goods through the bank to Bombay. He said that Mr. Narayanan's evidence that he had sent for him in May 1971 and had discussed with him about the non-payment of these 2 bills was not true. No such meeting took place. Mr. Narayanan before his departure on February 5, 1972 had told him that the drawers in Bombay owed some money to the Bombay Bank and therefore Mr. Narayanan wanted to know the exact amount he could realise by the sale of the goods in Singapore. He however had never asked him about payment of these 2 bills. He wrote the letter AB91 in March 1972 to Utamsing, the General Manager of the Bank at Calcutta because the Singapore Office did not assist him in his efforts to send the goods back to Bombay.

He said that in all these transactions covered by these bills there were no sale contracts between the drawers and him relating to the goods. No prices had been agreed for the goods between the drawers and him. What was stated in the invoices in AB7 and AB8 like all other invoices was not the value contracted for with the drawers. In fact it was not even the true value of the goods. It was an inflated value of the goods.

In cross-examination when he was asked why he had accepted the Bills of Exchange if he was not going to pay on the bills he replied it was just an acknowledgment of the receipt of the documents relating to the goods. When questioned as to why he had asked for an extension of time of the due dates to make payments on the Bills of Exchange his answer was that he had done so either to get money from the goods he would sell or to receive funds from the drawers to meet the bills. When further asked why he had not told that to the bank, he replied the bank knew about it. On further questioning he said he had told the bank that the goods were on consignment basis and unless he sold the goods or received money from the drawers he could not pay. He now said it was the bank who advised him to ask for an extension. He said it was Mr. Narayanan who had told him this. He had told Mr. Narayanan about getting money from India to supplement or pay in full the amount due to the bills. This could have been told to Mr. Narayanan in 1968 or 1969. When it was put to him that it was all the time his intention to meet the bills in full even though the goods were on consignment basis, his answer was that it was the intention of the drawers but not his. When put that the bank was not a party to this arrangement between the drawers and himself that the drawers will arrange for funds to meet these bills, he replied the bank knew about it because he had conveyed that information to Mr. Narayanan. This could have been at any time between 1968 and 1969. When questioned why he had not told the clerk who had protested for non-payment of the bills that the drawers had not provided the money he replied it did not occur to him. He said he was not aware that when the goods were sent on consignment there would be no Bills of Exchange and the goods in such cases would be released on the consignee signing a letter of undertaking like the blank form P12. When questioned about the writing of the words "on consignment" above the acceptance in P9 he said he did not draw the Bill Collector's attention to that and he did not know if the Bill Collector was aware of his having written those words. He said on that particular occasion he had put the firm's chop on the bill, then written "on consignment" on it and signed it. When further questioned whether he wrote his signature and the words "on consignment" on the same occasion he replied he was not sure about that. When it was put to him that he had done it on different occasions he again replied he was not sure of that. To a further question:

'You were doing something very very unusual and not proper. Why is it you are not sure about that?"

he replied:

"I just wanted to give a notice in writing. I did not even make a note of it and so I could not tell my solicitor about it."

When put that he had used a different pen and ink to write the words "on consignment" from that used for the signature he admitted it was quite possible but he could not say for certain. When shown D5B and the words "on consignment" on it in the same ink and writing as in Exhibit P9 he agreed he had made a note in D5B of what he had written on the bill Exhibit P9. The document D5B also related to the Bill P9. When questioned why the incident relating to this Bill P9 and the endorsement "on consignment" was not put to Mr. Narayanan when he gave evidence he said he had no particular record with him. His solicitors had asked the plaintiffs' solicitors to produce all the bills but they had not done so. When he was countered with the further question that he had at least one record in his possession at that time namely D5B which should have drawn his attention to this incident he replied that it had slipped his mind. When it was put to him that the conversation with Mr. Narayanan regarding this endorsement on the Bill P9 had never taken place he replied such conversation had in fact taken place. If he did not write the words "on consignment" on the day of acceptance then he said he would have seen the bill again when it was presented to him for payment. When it was put to him that he could have come across this bill after acceptance again only on the day of protest he replied he was not sure about it.

On further cross-examination he agreed that what the drawers were doing according to their arrangement was illegal but he would not agree that he was assisting the drawers in committing this illegal act. While the act was improper in India it was not so in Singapore. He did not agree that he was assisting the drawers in their illegal act to make money out of it. He explained in this transaction he was merely acting as a commission agent. He said he accepted the 2 bills in issue here like all the other bills that were presented to him in March 1970. If the bank

had notified him that these 2 bills had been purchased by the bank then he would never have accepted them.

When referred to the cable D11 dated July 3, 1968 which he is alleged to have sent to the drawers asking for funds to meet certain bills on the due date and questioned as to why he was concerned about the due date of the bill he replied that those were the early bills and he wanted each bill to go through smoothly. He wanted to have a good clean record with the bank as far as possible. He felt even though the bank knew the goods were sent on consignment basis he still thought he may get into the bad books of the bank for non-payment.

Regarding the 2 bills in issue he did not dispute that both the bills had been presented for payment. He was not aware that thereafter the bank in Bombay had been making efforts to recover the money on those 2 bills from the drawers but having seen the agreed bundle of documents he would not now dispute that such action had been taken in Bombay.

He said after receiving the solicitors' letter AB122 demanding payment on the 2 bills he had discussed with the drawers in Bombay about his and their liability on those 2 bills in issue. It was soon after this discussion in Bombay that this letter AB111 was written and handed to him by the drawers. He did not agree that this letter AB111 confirmed that the 2 bills in issue had been discounted by the bank in Bombay. The further cross-examination on this point went thus:

"*Q.* In the last paragraph of AB111 which reads —

'However we assure you that the bank also will not bother you for any payment of the balance bills, which were not discounted by the bank. And it is a matter between our 2 houses and will be settled by us at the earliest opportunity.'

Does it not imply that some bills were discounted?

A. I am not sure.

Q. The caption of this letter refers to the 2 particular Bills. In the last paragraph he says the balance bills were not discounted by the Bank.

A. I cannot say if the 2 Bills were discounted by the Bank. I agree I received this letter AB111 soon after the conversation with the drawers in Bombay. I agree it was handed to me.

Q. You did not raise any objection to the contents of it.

A. No.

Q. Did you ask the drawers for a letter like AB111 to say that these 2 particular Bills were not discounted by the Bank?

A. No."

The only other witness for the defence was Mr. Ng Gim Chong. He was Mr. Pereira's assistant officer in the Inward Bills Department of the plaintiff bank during the years 1969 and 1970. He had left the plaintiff bank in 1972 and is now working with a different bank in Singapore. According to him when he was working in the plaintiff bank's Inward Bills Department under Mr. Pereira he said when a Bill Collector returned to the bank with the bill after having presented it for acceptance he would make an entry in the presentment register of the result of such presentment. The Bill Collector would then send the bill to him together with the presentment register. He would then check the bill against the presentment register. When he checks the bill if he finds that the acceptor had written something on the bill besides signing it he would in every such case bring it to the notice of Mr. Pereira as that would be a qualified acceptance. The witness was then referred to the presentment register and asked to look under the date August 29, 1969 in the register and see whether the Bill No. FIBC 211-P9 had been presented for acceptance. He said there was such an entry showing that the bill had been accepted on that day without any qualification. He said that the Bill Collector had made an entry in the column of the register relating to the acceptance in respect of this bill. On that day the register with the bill was sent to him after the entry had been made. He was next shown the Bill Exhibit P9 and he said he could recall seeing that bill on that day. When referred to the endorsement "on consignment" in P9 he said he could not recall seeing those words on that day and if he had seen those words he would have referred the bill to Mr. Pereira. He was next questioned whether this bill had been presented for payment and he replied in his opinion it had been because he had seen a copy of the manifold form relating to this bill with the defence counsel that very morning. He was then shown Exhibit D5B whereupon he said it was a copy of this document D5B that he had seen with the defence counsel. He said from the hand written calculations in D5B he could say this bill must have been presented for payment because it would be on the morning of presentment that such calculations would be made and entered on the form. If there was no payment made the bill would be returned to him but this time he would not scrutinize the bill.

He cannot remember if this bill had come back to him. He went on to say that he might have been on leave during this period.

The cross-examination of this witness began at the adjourned hearing the next morning. During the cross-examination this witness said that the due date for payment of P9 was shown as October 28, 1969 on the bill. He then referred to the presentment register against that date and said that there was no record of it having been presented then. He was then asked to look at page 134 of the presentment register for 1971 to see if there was a record of Bill FIBC 211 as having been presented for payment. He confirmed there was such an entry and the date against that entry was June 29, 1971. (A photostat copy of page 134 of the register was put in as Exhibit P13). The remarks column against this entry read "Memo given" and the witness explained that this meant that D5B was given on that day. He went on to say that there was further confirmation of that fact in that the hand written total amount shown in D5B tallied with the sum $12,598.69 shown in the register at P13. This amount is worked out on the prevailing rate of exchange on that day. The hand written figures were those of Mr. Thomas who on that day was working in the Inward Bills Department and from the entries there he could say he was controlling Collection Bills on that day. Besides there was nothing in D5B to show that this bill had been presented earlier but other memos could have been used if there had been any earlier presentment of the bill for payment. At the end of this witness's evidence Mr. Selvam, counsel for the plaintiffs, applied to recall Mr. Khemani and

my brief note on this application speaks for itself and reads thus:

"Mr. Selvam.

Applies to recall the defendant because it was only now he noticed something in D5B. He would like to ask him a few questions on it. In the reverse of D5B is written 'Presented on June 29, 1971,' I only noticed this entry this morning because the photocopy of D5B which was given to me did not show the writing on the reverse. It is only by chance that I noticed it when I saw the actual exhibit D5B. This is how we were able to trace the entry in the presentment register.

Mr. J.

I oppose this application.

Ct: Application allowed."

Most of his cross examination here was very revealing but I shall quote only a part of it now.

"*Q.* Look at P9.
Would you agree that the endorsement 'on consignment' in P9 and the writing of 'on consignment' in D5B and the writing on the reverse of D5B of 'Presented' and the date there were written with the same pen and ink?

A. I cannot say for certain.

Q. Do you now agree that this Bill P9 was presented to you on June 29, 1971 for payment?

A. I am not sure of that.

Q. How do you account for the endorsement on the back of P5B (D5B)?

A. Many a time the Bill Collector brings the memo only without the Bill.

Q. If he did that do you agree you got P5B (D5B) on June 29, 1971?

A. It could have been so as it is written on the reverse.

Q. The endorsement on P5B (D5B) of 'on consignment' must have been done that day or later.

A. It could have been done earlier. This memo was presented earlier.

Q. When?

A. It could have come earlier.
Sometimes the Bill Collector takes back the memo.

Q. When did you write 'on consignment' on this memo D5B?

A. I do not know when.

Q. Put that this Bill was presented to you for the first time on June 26, 1961. — (June 29, 1961).

A. I do not agree.

Q. Put that it was on June 29, 1961 that you wrote 'on consignment' on the Bill as well as on D5B.

A. This could have been done earlier."

At the end of the hearing of this case I gave judgment for the plaintiffs on the claim in full with costs. In so doing in an oral judgment I indicated my main findings of facts and where necessary the view I took on the law as well. The findings of facts which I am now about to indicate are substantially and basically those that I had already indicated in my oral judgment. I have so far in this judgment above set out at some length both the plaintiffs' case as well as the defendants' case. I have also dealt in greater detail with certain portions of the evidence so that it could be clearly seen and understood how I arrived at my decisions on these questions of facts here. I have in addition tried to show how the evidence was unfolded before me as this too to some extent helped in ascertaining where the truth lay.

Having considered all the evidence in this case I found first of all that Mr. Narayanan was an honest and truthful witness and I generally accepted his evidence. The other main plaintiffs' witness Mr. Pereira was equally satisfactory. So too was the evidence of Mr. Ng Gim Chong the other bank employee. Though he was called by the defence he greatly strengthened the plaintiffs' case by providing some of the missing links in their version of these transactions and thereby giving a clearer and more complete picture of what had taken place.

On the other hand I found Mr. Khemani, the sole-proprietor of the defendant firm, to be a thoroughly unsatisfactory and unreliable witness. He had no scruples whatsoever and was prepared to say anything that would further his cause. I did not accept his evidence that sometime in late February or early March 1970 after he had learnt from the drawers that some shipments of goods and their corresponding Bills of Exchange would be coming for him and before he had accepted those bills he had gone and had a discussion with Mr. Narayanan over the bills and had informed Mr. Narayanan about the illegal arrangements he had with the drawers. I also rejected his further assertion that Mr. Narayanan had thereupon checked with the earlier bills from the drawers to the defendants and had given him the undertaking that as the bills were Collection Bills if he were to accept any of the bills the bank in its own name would not proceed against him on any of the bills.

I found that no such discussion of any sort had taken place between Mr. Narayanan and Mr. Khemani and no such undertaking had been given by Mr. Narayanan on behalf of the bank. The first time Mr. Narayanan had any discussion with Mr. Khemani about these bills was in May 1971 after Mr. Narayanan had received the letter AB54 from the Manager of the Bombay Branch as stated by Mr. Narayanan in his evidence.

The evidence quite clearly revealed that the drawers had an arrangement with the defendants and in pursuance of that arrangement these bills were drawn by them and accepted by the defendants. The drawers by this arrangement were clearly engaged in illegal transactions as far as the Indian Government and Indian laws were concerned and they were by these transactions trying to secure improperly import licences and the defendants were knowingly and actively assisting them in these transactions by accepting these bills.

As far as the bank was concerned they had no knowledge whatever of this arrangement between the drawers and the defendants or that the goods were being sent by the drawers in Bombay to the defendants on consignment basis. The bank was under the impression that they were straight forward sales of the goods from the drawers to defendants and the issue and acceptance of those bills had taken place in the normal course of business. The defendants had not informed the bank at any time before the acceptance by them of the 2 bills in question about this illegal arrangement and there was no evidence either that the drawers had done so. Besides there was nothing from the course of conduct up to the time when these 2 bills were accepted by the defendants from which the bank could have reasonably inferred or could have had reasonable grounds to believe that the defendants and the drawers were engaged in any illegal or irregular transactions. From the time the transactions between

the defendants and the drawers began in 1968, the first 4 or 5 bills had been accepted and duly retired by February 1970 though perhaps not promptly on their respective due dates but on extended dates.

In the beginning of March 1970 there were still a few bills outstanding — about 5 in all — but these outstanding bills had been readily accepted on presentment by the defendants and when presented for payment the defendants had in the normal course of business asked for extensions of time to make payments. So there was nothing here from which the bank should have known that these were illegal transactions between the drawers and the defendants. There was no evidence before me to show that the bank was anything but an innocent party in all these transactions.

The defence submitted that the bank owed a duty to the defendants and they should have informed the defendants that the bank had an interest in the 2 bills in question before it obtained their acceptance to them.

In my view in all the circumstances here there was no duty owed by the bank to the defendants and there was no necessity why the bank should have informed the defendants about their interest in the 2 bills. As the bank was not aware of this improper arrangement between the drawers and the defendants the bank was all the time under the impression that when the defendants accepted these bills from time to time the defendants intended to meet their obligations on the bills on the due dates in the normal course of business, be they Collection Bills or bills purchased by the bank. So there was no particular reason why the bank should have drawn their attention to these 2 bills just because the bank had purchased them. Moreover in the past among the first few bills which the defendants had met there were both kinds of bills and so the defendants themselves had made no distinction and treated them alike.

It was further submitted by the defence that when the Bank's Bill Collector presented the 2 bills here the defendants were under the impression that all these bills were presented on behalf of the drawers and therefore they were under the impression that their obligation under the acceptance was to the drawers and not to the bank. There was no substance in this submission and I found that the bank was the payee holder of the 2 bills in question and when the Bank's Bill Collector presented these 2 bills to the defendants he was correctly doing so on behalf of the bank and there was no justification for the defendants to have had any other impression or inference. The defendants having unconditionally accepted those 2 bills were bound to meet their obligations to the bank on the due dates on both these bills. The defendants have failed to meet the demand for payment on the 2 bills by the bank and these 2 bills still remained unpaid.

On all the evidence before me it was quite obvious and I found as a fact that words "on consignment" above the defendants' signature of acceptance in the Bill Exhibit P9- FIBC 211- were written by Mr. Khemani on June 29, 1971 when this bill was presented to him on that day for payment together with the associated "statement of acceptance" D5B by the Bill Collector. The writing of the words "on consignment" in D5B and the words "presented June 29, 1971" on the reverse side of D5B was most probably done on June 29, 1971 as well and almost simultaneously as in Exhibit P9 though of course this could have been done even later as this document D5B had been left with Mr. Khemani by the Bill Collector on that day. I also found that the hand written figures on D5B were only calculated and entered on that day June 29, 1971 by the bank before this bill and the document D5B were presented to the defendants.

I further found that this Bill P9 was *only* presented for payment on June 29, 1971 for the first time after it had been accepted by the defendants on August 29, 1969. I based this finding mainly on Mr. Pereira's evidence that this Bill P9 after it had been accepted on August 29, 1969 had by mistake gone into the "inactive" file of bills and had remained there until he received the letter P11 dated June 7, 1971 from Bombay concerning the goods covered by this particular bill when he made a search for this bill and recovered it from the "inactive" file. It clearly had got in the "inactive" file soon after acceptance and long before its due date of payment which was October 28, 1969 because even the advice concerning the acceptance of this bill and its due date of payment had not been sent to the Bombay Branch of the Bank.

In addition I found that no discussion had taken place between Mr. Khemani and Mr. Narayanan within a month of his making this endorsement of "on consignment" in the Bill P9 about that endorsement. I found that this alleged discussion was an absolute fabrication on the part of Mr. Khemani.

What Mr. Khemani wanted this court to infer was that these words "on consignment" had been written by him on the Bill P9 either when he accepted this bill on August 29, 1969 on the Bill Collector presenting it for his acceptance or some days after acceptance when the bill on the due date for payment would again have been presented to him for payment. By this Mr. Khemani was trying to show that he had given some sort of a written notice to the bank that the goods covered by this bill was on consignment basis and that he had done so even long before the 2 bills in issue in this action had been accepted by him in March 1970. Now the evidence of Mr. Pereira and Mr. Ng Gim Chong and the record in the presentment register show that the probabilities are that on August 29, 1969 the bill had been accepted unconditionally and without any qualifications and the words "on consignment" had not been written by Mr. Khemani on that day when he accepted P9. On all the evidence here I found as a fact that the Bill P9 had been accepted on August 29, 1969 unconditionally and Mr. Khemani had not on that day written the words "on consignment" on it when he signed P9 and accepted it on behalf of the defendants.

It must be remembered that in May 1971 Mr. Narayanan on behalf of the bank had spoken to Mr. Khemani asking him to pay up on the 2 bills in question. So in June 1971 his liability to the bank on these 2 bills was prominent in his mind and so when the Bill P9 was presented to him by the Bill Collector for payment on June 29, 1971 he seized the opportunity of writing the words "on consignment" on it

in order to fabricate evidence to bolster his defence that the bank had notice that the goods covered by the bills like the 2 bills in issue here were sent on consignment basis from the drawers to the defendants.

It was also submitted by the defence counsel that having regard to improper or illegal arrangement between the drawers and the defendants concerning the issue and acceptance of these Bills under the provisions of section 30(2) of the Bills of Exchange Act the onus was on the plaintiffs to prove that they had given value in good faith for the 2 Bills in question. I took the view that the provisions of section 30(2) of the Bills of Exchange Act did not apply to the plaintiffs here as they are the original payee holders of the 2 Bills here following the decision in *Talbot* v. *Von Boris.*[1] Even if I am wrong on this point I found that on the evidence before me the plaintiffs had shown that they had given value in good faith for these 2 Bills in issue here.

First there is the evidence of Mr. Pereira that these 2 bills had the rubber stamp chop containing the prefix code letters "FBPRW" against their serial numbers indicating that the Bombay Branch had purchased these 2 bills from the drawers and would have credited the drawers' account with the money. Secondly there is the letter AB111 from the drawers to the defendants dated December 11, 1972 coupled with the evidence of Mr. Khemani regarding the circumstances under which the drawers wrote this letter and handed it to him in Bombay which quite clearly showed that there was an admission by the drawers that they had discounted these 2 bills with the plaintiff bank. Besides the evidence before me also showed that the plaintiffs were an innocent party in all these transactions and during the material times they were unaware and had no knowledge of the private arrangements between the drawers and the defendants. On the evidence before me I found as a fact that the plaintiff bank had given value in good faith for both these bills.

Accordingly I gave judgment for the plaintiffs as claimed with costs.

Judgment for the plaintiff.

Solicitors: *Drew & Napier; J. B. Jeyaretnam & Co.*

MALAYSIAN REPORTS

KASIVISVANATHAN CHETTIAR v. PEREIRA

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) February 21, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 135 of 1975]

Land Law — Caveat — Application for removal of private caveat — Caveator claiming he has bought land — Suit instituted by caveator against registered owner — No onus on caveator to prove he has a registrable interest in land — Need to preserve status quo — National Land Code, s. 327.

The respondent was in possession of a piece of land. The appellant the registered owner of the land wanted him to get out. The respondent claimed that he had bought the land and that he was permitted to build the house on it. The appellant on the other hand said that he was only a tenant. The respondent had lodged a caveat against the land and instituted proceedings against the appellant relating to the land. The appellant applied to have the caveat removed and his application was refused in the High Court. He appealed to the Federal Court.

Held, dismissing the appeal: (1) there was a real dispute between the parties regarding the land. The respondent had filed a suit against the appellant and it was desirable that the *status quo* be preserved pending the disposal of the suit;

(2) where the caveator has filed a suit against the caveatee to vindicate his claim he does not have to prove he has a good claim to a registrable interest in the land when the caveatee applies to have the caveat removed, but only when the suit comes to trial.

Case referred to:-

(1) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1 M.L.J. 145.

FEDERAL COURT.

R. Tan for the appellant.

S. Periasamy for the respondent.

Suffian L.P. (delivering the judgment of the Court, read by Wan Suleiman F.J.): We dismissed this appeal and promised to give our reasons which we now do.

The land concerned is best described by reference to the premises on it known as No. 11 and 11-1, Jalan Kasipillai, Sentul, Kuala Lumpur.

The premises are a semi-permanent house, part brick and part timber, built by the respondent. The house was also occupied by the respondent.

The respondent lodged a caveat against the land.

The appellant, its registered owner, applied to the court to have the caveat removed.

The court refused to order the caveat removed.

The appellant appealed to us.

The principal reason why we dismissed this appeal is that there is a real dispute between the parties regarding this land; that to resolve this real dispute the respondent had filed a suit against the appellant; and that it is desirable that the *status quo* be preserved pending the disposal of that suit, so that the appellant cannot deal with the land until then. The dispute is this. The respondent is in possession. The appellant wants to get him out. The respondent says that he has bought the land and he was permitted to build the house on it. The appellant says that the respondent is only a tenant.